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may repeat his testimony at other trials, and the criminating evidence may likewise be used at other trials. But this is the extent of the waiver in both cases, and it is very different from compelling the witness to give additional criminating evidence in new proceedings, and under different circumstances. The fact that some of this evidence may have been disclosed beyond recall is immaterial, as the question is whether the witness can be compelled to criminate himself in another trial, and not how much evidence exists against him.²⁰

MARITIME LIENS.—The validity of a common law lien is conditioned upon the retention of possession by the lienor. An equitable lien is merely a charge or duty, the performance of which is enforced by a court of equity acting *in personam*.¹ A maritime lien, however, exists without possession, and is enforced in admiralty by proceedings *in rem*. It is more in the nature of what the civil law terms an hypothecation,—“The right which a creditor has in the thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price.”² The claim or contract out of which it arises, moreover, must be of a maritime nature, that is, must relate to the improvement or preservation of a maritime entity.³ Services, however, are not maritime which are confined to the construction or original equipment of a vessel,⁴ or which do not appertain essentially to things of the sea.⁵

Inasmuch as a ship is a wanderer, and touches at ports in foreign lands where neither the master nor the owner is acquainted, and on whose credit alone few would willingly furnish supplies or repairs to the vessel, courts of admiralty have held from the beginning that the ship was impliedly pledged for such as were necessary for the

²⁰Commonwealth v. Phoenix Hotel Co. (1914) 157 Ky. 180, 188-189.

¹3 Pomeroy, Eq. Jur. (3rd ed.) § 1233.

²See The Young Mechanic (C. C. 1855) 2 Curtis 404, 410; Vandewater v. Mills (1856) 19 How. 82. It is true that an equitable lien is likewise analogous to an hypothecation, 3 Pomeroy, Eq. Jur. (3rd ed.) § 1233, but it can be enforced only by an action *in personam* and not by one *in rem* as in the case of a lien in admiralty.

³Bottomry bond—see The Grapeshot (1869) 9 Wall. 129. Respondentia bond—see The Julia Blake (1882) 107 U. S. 418. Salvage—see The Launberga (D. C. 1907) 154 Fed. 959. Towage—see The J. W. Tucker (D. C. 1884) 20 Fed. 129; The Mystic (D. C. 1886) 30 Fed. 73; *contra*, James Dalzell's Son & Co. v. The Daniel Kaine (D. C. 1887) 31 Fed. 746; see The J. Doherty (D. C. 1913) 207 Fed. 997. Repairs—The Thomas W. Rodgers (D. C. 1912) 197 Fed. 772, *affd.* (C. C. A. 1913) 207 Fed. 69; The O. H. Vessels (D. C. 1910) 177 Fed. 589, *affd.* (C. C. A. 1910) 183 Fed. 561. Supplies—see Saylor v. Taylor (C. C. A. 1896) 77 Fed. 476. Seamen's wages—The L. L. Lamb (D. C. 1887) 31 Fed. 29. Advances—The Emily Souder (1873) 17 Wall. 666. The lien for advances is classified according to the rank of the lien discharged. The Wyoming (D. C. 1888) 36 Fed. 493. Stevedores' services—Luckenbach v. Pearce (C. C. A. 1914) 212 Fed. 388.

⁴Construction contract—People's Ferry Co. etc. v. Beers (1857) 20 How. 393; Edwards v. Elliott (1874) 21 Wall. 532. Original equipment—The United Shores (D. C. 1912) 193 Fed. 552.

⁵Watchmen—McGinnis v. The Grand Turk (D. C. 1862) Fed. Cas. 8800; 14 Columbia Law Rev., 163. Mortgages—The Lottawanna (1874) 21 Wall. 558; see The J. E. Rumbell (1893) 148 U. S. 1.

continuance of the voyage. Where, however, the necessities were furnished at the home port, there was a presumption that credit was extended to the owner personally, and no lien recognized by courts of admiralty, resulted.⁸ In order to harmonize the law as to services rendered in the home port with that as to services rendered in a foreign port, state statutes were generally enacted providing a lien under such circumstances. The Constitution vests in the federal courts power over "all cases of admiralty and maritime jurisdiction."⁷ It necessarily follows that the States are prohibited from entertaining jurisdiction of any cause of action of a maritime nature which involves a procedure analogous to that enforced in courts of admiralty.⁸ There is no constitutional prohibition, however, which prevents the States from providing for, and enforcing, claims which are not of a maritime character. In fact, it was for that very reason that state statutes authorizing liens enforceable in state courts for the construction of a vessel, were upheld.⁹ But as the nature of a lien for services rendered in the home port of a vessel is maritime, the States were prevented from enforcing statutes authorizing liens under such circumstances.¹⁰ It seems that the federal courts should likewise have refused to recognize such laws. By reason of various changes in the Twelfth Admiralty Rule, however, supplemented by anomalous reasoning, the federal courts assumed jurisdiction to enforce liens for supplies and repairs furnished in the home port where such a lien was authorized by a state law.¹¹ A federal statute, enacted in 1910, abrogated this rule and made provision for a uniform lien for maritime services whether rendered in a foreign or a home port.¹² In the recent case of *The Dredge A* (D. C. E. D. N. C. 1914) 217 Fed. 617, it was held

⁸ Columbia Law Rev., 316. A stevedore has no lien for services rendered in the home port. *The Gilbert Knapp* (D. C. 1889) 37 Fed. 209. Where the vessel is supplied in her home port and representations are made to the effect that the vessel is foreign, a lien by estoppel arises. See *The St. Jago de Cuba* (1824) 9 Wheat. 409, 417; *The Brig E. A. Barnard* (C. C. 1880) 2 Fed. 712. The master of a vessel is not entitled to a lien, as he is presumed to have contracted with the owner personally and not on the credit of the ship. *The Steamboat Orleans v. Phoebus* (1837) 11 Pet. 175.

⁷ U. S. Const., Art. 3, § 2.

⁹ *The Glide* (1897) 167 U. S. 606. State courts have jurisdiction over maritime actions if they are *in personam*. *Leon v. Galceran* (1870) 11 Wall. 185.

¹⁰ *Edwards v. Elliott, supra*; *The Winnebago* (C. C. A. 1905) 141 Fed. 945, *affd.* (1907) 205 U. S. 354. Federal courts will not enforce such statutes. *Roach v. Chapman* (1859) 22 How. 129.

¹¹ *The Lottawanna, supra*.

¹² Hughes, Admiralty, § 49.

¹³ 36 U. S. Stat. at L. 604. The statute supersedes all state laws on the subject. *The Ha Ha* (D. C. 1912) 195 Fed. 1013; see *The Saratoga* (C. C. A. 1913) 204 Fed. 952. The few cases which have arisen under the act seem to hold that the hitherto established rules as to what are maritime services remain unaltered. *The J. Doherty, supra*; *The Strathnairn* (D. C. 1911) 190 Fed. 673; *The United Shores, supra*; *The Rupert City* (D. C. 1914) 213 Fed. 263; nor does the statute affect the question of priorities. *The Towanda* (D. C. 1914) 215 Fed. 232. It reverses the rule as to credit, however, by authorizing the presumption that credit was extended to the vessel rather than to the owner. *Ely v. Murray etc. Co.* (C. C. A. 1912) 200 Fed. 368.

that notwithstanding the broad terms of this statute, it applied to those services alone which were in their nature maritime, and therefore did not authorize the federal courts to enforce a lien for the construction and equipment of a vessel performed in her home port.

Contrary to the rule at common law, liens enforceable in admiralty rank according to the inverse order of their dates.¹³ This doctrine is based on the practical reasoning that a service rendered to a vessel tends to the preservation of the *res* without which previous lienors might lose their security.¹⁴ A lien for a tort committed by a vessel is subject to the identical rules of priority which govern liens for services, on the theory that one who equips or supplies a vessel and then permits it to sail forth, holds his lien liable to any claim for damages to which the ship, as a wrongdoer, may subsequently subject itself.¹⁵ Where liens are concurrent, their priority is based on the relative merits of the various claims; a lien for salvage, for instance, has precedence over a lien for wages,¹⁶ and a claim for seamen's wages outranks one for towage,¹⁷ or supplies.¹⁸

As a maritime lien is a secret lien and is enforceable against the vessel even after she reaches the hands of an innocent purchaser, it is only fair that it be required to be enforced with the utmost diligence, and failure to do so renders the lien stale as to subsequent purchasers or lienors of the vessel, on the same theory that laches is a bar to an action in equity.¹⁹ The question of diligence is one of fact under all the circumstances of each case, and in this connection, the speed of the particular vessel, the frequency with which it touches at the same port, and the opportunities offered to libel it, should all be taken into consideration.²⁰ It is practically impossible to evolve any inflexible

¹³2 Jones, Liens (3rd ed.) § 1777.

¹⁴See The J. W. Tucker, *supra*. Seamen's wages earned subsequent to salvage supersede claims for the latter; *Dalstrom v. The Schooner "E. M. Davidson"* (D. C. 1880) 1 Fed. 259; but not where earned prior to the salvage. See *The City of Tawas* (D. C. 1880) 3 Fed. 170.

¹⁵*The America* (D. C. 1909) 168 Fed. 424; *The F. H. Stanwood* (C. C. A. 1892) 49 Fed. 577. It is held, by the weight of authority, that a tort is not maritime unless committed on the water. 5 *Columbia Law Rev.*, 312; 8 *Columbia Law Rev.*, 499.

¹⁶*The Athenian* (D. C. 1877) 3 Fed. 248.

¹⁷*The City of Tawas, supra*. An advance to pay off seamen's wages outranks a bottomry bond. *The Dora* (C. C. 1888) 34 Fed. 348. It was once thought that the lienor who first attached the vessel had a priority; *The Triumph* (D. C. 1841) Fed. Cas. 14182; *The Globe* (C. C. 1852) Fed. Cas. 5483; but this view has long since been discarded. *The J. W. Tucker, supra*. A tort claim ranks equally with a bottomry bond and a lien for supplies, but is inferior to a lien for seamen's wages. *The America* (D. C. 1853) Fed. Cas. 288. In all cases, a maritime lien takes precedence over a non-maritime lien. *The J. E. Rumbell, supra*; *Baldwin v. The Bradish Johnson* (C. C. 1878) Fed. Cas. 798.

¹⁸*The America* (D. C. 1853) Fed. Cas. 288.

¹⁹*The Ella* (D. C. 1897) 84 Fed. 471; *The Harriet Ann* (D. C. 1874) Fed. Cas. 6101.

²⁰*Blaine v. The Ship Charles Carter* (1808) 4 Cranch 328; *The Tiger* (D. C. 1898) 90 Fed. 826; see *The Chusan* (C. C. 1843) Fed. Cas. 2717. A lien may be waived either expressly, *The Half Moon* (D. C. 1891) 46 Fed. 812, or impliedly, as by taking a mortgage on the vessel and a note extending over the period within which the lien is allowed by maritime law. *The Nebraska* (C. C. A. 1895) 69 Fed. 1009; *The Lucille* (D. C. 1913) 208 Fed. 424. The mere taking of a note is not such a waiver. *The Chusan, supra*; *The Emily Souder, supra*.

rule from the many decided cases on the subject, as courts of admiralty are greatly influenced by equitable considerations and the special circumstances of the particular case, which outweigh the broad underlying principles governing the subject.²¹ In fact, the declaration that in dealing with this question "each court is a law unto itself", well explains the seeming conflict of authorities.²²

REPRESENTATION OF PERSONS NOT IN ESSE.—It is a rule in equity that all persons materially interested in the subject-matter of the suit should be made parties thereto, so that there may be a complete decree binding on all.¹ A limitation upon this rule is expressed by the doctrine of representation. Under one phase of this doctrine, parties to a litigation concerning realty will be deemed to represent persons not *in esse* so that they are bound by the judgment, if it appears that because of a similarity of interest the latter's rights will be fully protected.² This power to deal with property in which persons not *in esse* may have expectant estates, is inherent in a court of equity and exists independent of statute.³ It may be said to be the result of convenience, or even of necessity, since otherwise property subject to expectant estates would be tied up for indefinite periods, all improvement would be checked, and the rights of the present generation would be needlessly sacrificed for those of a possible posterity.⁴

From an early date, there have been differences of judicial opinion as to when the future interests of unborn persons are properly represented. In England, it has been held that a judgment of partition against one seized of a fee defeasible by a shifting use, executory devise, or conditional limitation, cannot bind the expectant estates of those not *in esse*.⁵ In this country, however, it matters not that

²¹Hughes, Admiralty, § 175.

²²See *The City of Tawas*, *supra*, p. 172. An example of the confusion in this phase of the law is illustrated by cases in which there is a conflict of laws. *Cf. The Union* (1860) Lush. 128; *The Enterprise* (D. C. 1870) 1 Low. 455. The existence of a lien is determined by the *lex loci contractus*. *The Barque Havana* (D. C. 1858) 1 Sprague 402; *The Maud Carter* (D. C. 1886) 29 Fed. 156. A maritime tort committed in one country gives a cause of action in the courts of a foreign nation; *Panama R. R. v. Napier Shipping Co.* (1897) 166 U. S. 280; but it has been suggested that it must first be shown that the tort is actionable in both jurisdictions. See *Carr v. Francis Times & Co.*, L. R. [1902] A. C. 176, 182.

¹See *Gregory v. Stetson* (1890) 133 U. S. 579, 586.

²*Gavin v. Curtin* (1898) 171 Ill. 640; *Baylor's lessee v. Dejarnette* (Va. 1856) 13 Gratt. 152.

³*Ridley v. Halliday* (1901) 106 Tenn. 607. The legislature, as *parens patriae*, may, by special act, authorize the sale of the contingent rights of those not *in esse*. See *Brevoort v. Grace* (1873) 53 N. Y. 245. In Massachusetts, a statute provides for the appointment of a guardian *ad litem* to insure the protection of such interests. See *Loring v. Hildreth* (1898) 170 Mass. 328.

⁴See *Bolfi v. Fisher* (S. C. 1850) 3 Rich. Eq. 1; *Hale v. Hale* (1893) 146 Ill. 227.

⁵*Goodess v. Williams* (1843) 21 Eng. Ch. *595; but see *Giffard v. Hort* (1804) 1 Sch. & Lef. 386.